

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID SCOTT WORKMAN,

Defendant and Appellant.

F077881

(Super. Ct. No. 18CM0211)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Kings County. Thomas DeSantos, Judge.

Steven A. Torres, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the State Attorney General, Sacramento, California, for Plaintiff and Respondent.

-ooOoo-

---

\* Before Levy, Acting P.J., Poochigian, J. and Meehan, J.

## **INTRODUCTION**

Appellant David Scott Workman pled guilty to one count of second degree murder and a violation of Vehicle Code section 23153, subdivision (a), driving while under the influence (DUI) and causing bodily injury. He had prior DUI convictions. The trial court imposed a determinate term of three years for the Vehicle Code section 23153, subdivision (a) conviction and a consecutive term of 15 years to life for the second degree murder conviction. Workman appealed, and the trial court issued a certificate of probable cause.

Appellate counsel filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436. We affirm.

## **FACTUAL AND PROCEDURAL SUMMARY**

The facts of the offense are taken from the probation report. On February 17, 2018, there was a traffic collision on Highway 198. When the California Highway Patrol (CHP) arrived, one victim, Edwin Tate, was lying in the westbound lane of the highway. There was a tan Chevrolet Malibu parked on the right shoulder and a white Kawasaki motorcycle with significant rear-end damage attached to the front of the Chevrolet. Workman was standing near the Chevrolet.

Tate was pronounced dead at the scene. A second victim, Honorio Diaz, was injured when he swerved to avoid Tate's body in the roadway and his vehicle rolled over.

When a CHP officer asked Workman for his driver's license, Workman responded that it was suspended because of prior DUI's. When asked about the collision, Workman replied that he was traveling at approximately 65 to 70 miles per hour on westbound Highway 198 when "all of a sudden" he saw a motorcycle in front of him and hit it. Workman stated he pulled over to the shoulder and stopped.

Workman admitted to being the driver of the Chevrolet at the time of the collision. The CHP officer noticed Workman's eyes were red and watery; Workman's speech was thick and slurred; Workman's breath emitted a strong odor of alcohol. Workman acknowledged consuming " 'a lot' " of alcohol. He declined to perform field sobriety tests, stating he would " 'fail.' " Several empty beer containers were in the Chevrolet.

Shortly thereafter, a preliminary alcohol screening (PAS) test was administered to Workman and the results came back at 0.260 and 0.261 percent. Workman was arrested and transported to the CHP office. Subsequent breath tests showed results of 0.22 and 0.24 percent.

On February 20, 2018, Workman was charged in count 1 with murder, in violation of Penal Code section 187, subdivision (a);<sup>1</sup> in count 2 with violating section 191.5, subdivision (a), gross vehicular manslaughter while intoxicated; in count 3 with violating Vehicle Code section 23153, subdivision (a), driving under the influence of alcohol causing bodily injury; count 4 alleged a violation of Vehicle Code section 23153, subdivision (b), driving with a 0.08 percent blood-alcohol content causing bodily injury; and count 5 alleged a violation of Vehicle Code section 14601.2, subdivision (a), driving with a suspended license. As to counts 3 and 4, it was alleged that Workman caused bodily injury to more than one victim within the meaning of Vehicle Code section 23558. It also was alleged as to counts 3 and 4 that Workman personally inflicted great bodily injury within the meaning of section 12022.7, subdivision (a).

Counsel was appointed to represent Workman. Workman pled not guilty and entered a general time waiver.

A preliminary hearing was scheduled for May 16, 2018. At that time, the trial court noted it had been informed that Workman intended to plead to counts 1 and 3, with

---

<sup>1</sup> References to code sections are to the Penal Code unless otherwise specified.

a determinate term of three years for count 3 and a term of 15 years to life for count 1. Defense counsel commented, “It’s life with a minimum of 15 for parole. He understands that.”

Before accepting Workman’s plea, the trial court asked if Workman had sufficient time to discuss the plea with his counsel, to which Workman replied, “Yes.” The trial court asked if Workman wanted any more time to speak with counsel and Workman responded, “No.” The trial court then referenced the two plea forms; one was a DUI advisement of rights, waiver and plea form; the other a form to plead guilty for felony offenses.

The guilty plea form reflected that Workman would plead guilty to counts 1 and 3, with a stipulated sentence of three years for the count 3 offense and 15 years to life for the count 1 offense. In exchange, the other counts would be dismissed. Workman had initialed the various provisions of the form and signed the form.

The trial court proceeded to address the guilty plea form. Workman was asked if he understood that by pleading guilty, he was giving up his rights to a trial, to confront witnesses, to produce evidence on his behalf, and to a preliminary hearing. Workman responded, “Yes.” The trial court then noted that Workman’s initials appeared on the guilty plea form in several boxes; Workman was asked if he understood each of the rights described on the form and gave up those rights. Workman responded, “Yes.”

Counsel had also signed the guilty plea form and the trial court asked if counsel had discussed possible defenses and consequences of the plea with Workman and concurred with the plea and waiver of rights. Counsel responded affirmatively. Workman was informed that at sentencing, a different judge would preside, and Workman gave a waiver pursuant to *People v. Arbuckle* (1978) 22 Cal.3d 749.

The People noted that the count 1 charge was for second degree murder and was based on the facts of the offense and Workman’s prior DUI convictions. The People

stated that Workman previously had been warned that driving under the “influence [of alcohol] is inherently dangerous to human life and that if he were to kill someone during the process of one of these DUI’s that he would be charged with murder.”

The People recited the factual basis for the plea, including the circumstances of the collision and the prior DUI’s, and defense counsel agreed with the factual statement. Workman was asked, “[d]id all of that happen,” to which he responded, “Yes.”

The trial court then proceeded to state the count 1 charge as second degree murder and asked Workman, “how do you plead?” Workman responded, “Guilty.” The trial court then articulated the count 3 offense and allegations appended thereto. Workman pled guilty to the count 3 offense and admitted the allegations.

The trial court found each plea and admission to be “knowingly, intelligently, freely and voluntarily made, with an understanding of the nature of the consequences.” The trial court found a factual basis for the plea. Workman also waived his appellate rights. The People moved to dismiss the remaining counts in light of Workman’s plea and the motion was granted.

The trial court also went over the DUI advisement form with Workman, who confirmed he understood the form and acknowledged signing the form.

At the June 14, 2018, sentencing hearing, the sentencing judge noted there was “a stipulated sentence for 18 years to life.” Numerous members of Tate’s family testified at sentencing.

The trial court gave an indicated sentence that it would deny probation and impose the agreed-upon sentence, consisting of the middle term of three years for the count 3 conviction and a term of 15 years to life for the second degree murder conviction, for a total indeterminate term of 18 years. The trial court also stated its intent to impose mandatory fines and fees.

Workman addressed the court and apologized for his actions. He asked the trial court to “think about dropping that L.” The People asked the trial court to impose the agreed-upon sentence, which included a potential life term.

The trial court proceeded to impose its indicated sentence, including various fines, fees, and restitution. The abstract of judgment accurately sets forth the trial court’s oral pronouncement of sentence.

### **DISCUSSION**

Workman filed a notice of appeal on July 20, 2018. Section 1237.5 prohibits appealing a conviction following a plea of guilty or no contest unless a defendant obtains a certificate of probable cause from the trial court. Workman obtained a certificate of probable cause on July 27, 2018.

Appellate counsel filed a brief pursuant to *People v. Wende, supra*, 25 Cal.3d 436 on October 4, 2018. The same day, this court issued its letter inviting Workman to submit supplemental briefing. Workman’s supplemental brief was filed on November 2, 2018.

In his supplemental brief, Workman essentially contends defense counsel rendered ineffective assistance. He appears to contend defense counsel rendered ineffective assistance by not conducting discovery and by implying that Workman would not be sentenced to an indeterminate term of 15 years to life by the judge at sentencing, even if it was part of the plea agreement. Workman also seems to contend that his actions do not amount to second degree murder.

At the hearing where Workman entered his plea of guilty, prior to accepting the plea, the trial court inquired of Workman if he understood that by entering a plea, he was giving up his rights to a trial, to confront witnesses, to produce evidence in his defense, and to a preliminary hearing. Workman affirmed that he understood he was giving up these rights.

Prior to accepting Workman's plea, the trial court clarified that the plea called for a sentence of "life, minimum of 15." The trial court informed Workman that even though there would be a different judicial officer presiding at sentencing, "the judge will give you the exact same sentence that's been stipulated to today." Workman responded, "All right."

The record does not reflect ineffective assistance of counsel. (*People v. Jenkins* (2000) 22 Cal.4th 900, 952.) There is nothing in the record to demonstrate that defense counsel's performance fell "outside the wide range of professionally competent assistance." (*Strickland v. Washington* (1984) 466 U.S. 668, 690.) Any claim of ineffective assistance of counsel should be brought in a petition for writ of habeas corpus, not on direct appeal. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

As for the factual basis supporting the second degree murder plea, the People noted the second degree murder charge was based on the facts of the current offense and Workman's prior DUI convictions. The People stated that Workman previously had been warned that driving under the "influence [of alcohol] is inherently dangerous to human life and that if he were to kill someone during the process of one of these DUI's that he would be charged with murder." The People recited the factual basis for the plea, including the circumstances of the collision and the prior DUI's. Workman was asked, "[d]id all of that happen," to which he responded, "Yes."

Second degree murder is the unlawful killing of a human being with malice aforethought. (*People v. Elmore* (2014) 59 Cal.4th 121, 132.) Malice is implied when the killing is the result of an intentional act, the natural consequences of which are dangerous to human life, and the act is deliberately performed with knowledge of, and conscious disregard for, the danger to human life. (*People v. Cook* (2006) 39 Cal.4th 566, 596.)

“It is well established that driving while intoxicated is an act which may support a conviction for second degree murder under an implied malice theory. (*People v. Ferguson* (2011) 194 Cal.App.4th 1070, 1080.) “Malice may be implied when a person willfully drives under the influence of alcohol.” (*People v. Wolfe* (2018) 20 Cal.App.5th 673, 681.)

Workman willfully drove his vehicle while intoxicated, even though his license had been suspended because of prior convictions for DUI. At the time of the collision that took Tate’s life, Workman’s blood-alcohol level was about three times the limit for establishing intoxication. These facts establish implied malice and support the second degree murder conviction. (*People v. Wolfe, supra*, 20 Cal.App.5th at p. 681.)

Any objection Workman has to his conviction and sentence appears to amount to nothing more than “buyer’s remorse” with respect to the plea bargain. Buyer’s remorse does not constitute good cause to set aside a plea agreement. (*People v. Simmons* (2015) 233 Cal.App.4th 1458, 1466.)

### **DISPOSITION**

The judgment is affirmed.